



**INTERNATIONAL LEAGUE
OF COMPETITION LAW**



Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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Insights from the Unified Patent Court

Reflecting on 18 months of progress

Panel 3B: Margot Kokke (UPC Judge, Hague Local Division)
Kai Härmand (UPC Judge, Nordic-Baltic Regional Division)
Simon Walker (Technical UPC Judge)
Sidd Kusumakar (Powell Gilbert)
Agathe Michel-de Cazotte (Carpmaels & Ransford)
Mark van Gardingen (Brinkhof)

Chaired by Tess Waldron (Powell Gilbert)

SUMMARY OF SESSION

The UPC System

- The Unified Patent Court (UPC) is the first civil law multi-jurisdictional court and has been operational since 1 June 2023. It currently has jurisdiction over 18 Contracting Member States which have ratified the Agreement on a Unified Patent Court (UPCA). The UPC Court of First Instance sits as international panels across local, regional and central divisions comprising legally qualified and (often) a technically qualified Judge. The Presiding Judge has a deciding vote. A Court of Appeal is based in Luxembourg.
- The UPC bases its decisions on EU law, the UPCA, the European Patent Convention (EPC), other international agreements and national law (Art. 24 UPCA). Rules of procedure (RoP) lay down the details of proceedings before the UPC (Art. 41 UPCA). Despite many different legal traditions across Europe, the UPC adopts a common procedure which amalgamates different elements of these traditions e.g. bifurcation of revocation and infringement proceedings (Germany), saisies / seizures (France), interim conferences and active case management (UK, despite not being a Contracting Member State), “*kort geding*” summary proceedings (Netherlands) and access to documents in the proceedings (Nordic-Baltic).
- Despite the RoP setting out a common procedure, the Judges, parties and their representatives can apply their own national gloss (and each of the English, French and German texts of the UPCA and RoP are equally authentic). Over time, we expect the Court of Appeal to harmonise inconsistent approaches.
- Regarding representation, the panel discussed that although Ireland has not yet ratified the UPCA (and therefore Ireland is not yet a Contracting Member State), Irish-qualified solicitors are permitted to represent clients before the UPC under EU law.

UPC Practice

- The UPC has been a runaway success with over 530 cases, including >200 infringement actions, >200 counterclaims for revocation, >50 applications for provisional measures and >50 standalone revocation actions.
- German local divisions have seen the highest activity, which is unsurprising in view of the high levels of patent litigation already taking place in German courts. However, given how busy these tribunals now are, litigants may consider it easier and quicker to start claims elsewhere. Industry is starting to use a wider range of divisions and the availability of multiple divisions across Europe is also contributing to litigation strategy. Every division except the Ljubljana local division (Slovenia) has now seen a case.
- English is slowly becoming the predominant language at the UPC (~52%) compared to German (~41%), French (~3%) and other (~4%). This trend is unsurprising given that English is often the lingua franca between panels and lawyers from different countries and given the number of European patents published in English.

Legal and Technical Judges

- The experience of most UPC technically qualified Judges remains limited (as a result of the relatively few cases that have proceeded to trial since the UPC started), but they can be appointed at the request of the panel itself or one or more of the parties (during or after the closure of the written procedure, but usually prior to the interim conference). The role requires the technical Judge to familiarise themselves with the patent in suit and the parties' pleadings, and then consult and share views with legal Judges on the substantive issues of infringement and (in particular) validity. As most technical Judges come from private practice or industry, a key challenge will be to assess and balance competing arguments and form an independent view based only on the information presented by the parties. Initial concerns regarding conflicts have yet to materialise.
- Despite the UPC being a pan-European Court with autonomous rules, legal Judges inevitably initially tend to use their national experience when interpreting the rules, which is balanced by the fact that judges from different backgrounds are part of the court. Judges will generally try to be practical when interpreting the RoP. These rules stem from national provisions but there is no historic UPC case law, allowing Judges (and parties / their representatives) to start afresh when interpreting them. Judges are very active in co-ordinating with their colleagues on a regular basis to ensure case law evolves smoothly. However, they need to be very flexible as many devote their time between the UPC and their respective national courts.



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UPC Outlook

- The UPC is very much a start-up. Nevertheless, the application of procedural and substantive issues is quickly becoming clearer, more harmonised and predictable. It is anticipated that this will continue as more cases are decided and new issues are litigated.
- Timelines are generally extremely tight, which is a challenge for litigators. However, this will help to achieve the court's aim of resolving cases quickly.
- Despite some early technical difficulties with the UPC case management system (CMS), a new system is being developed in co-ordination with the European Patent Office (EPO), which is expected to become available next year and make the system more user friendly.
- The UPC appears to be functioning effectively and expeditiously. Representatives have confidence in the Court, although in these early days it is not always entirely clear how the various procedural mechanisms should operate (and in time, the RoP may need to be amended). The ability for Judges to reach the correct conclusion is aided by broad case management powers and active case management, to further ensure that proceedings progress smoothly and game playing is disincentivised. It has also helped that the CoA has quickly clarified many procedural issues.